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Supreme Court, U.S.
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No. .

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

JOHN PALMA AND
LINCOLN HOUSING AUTHORITY,
PETITIONERS,

v.

AMY ADLER,
RESPONDENT.

Petition for a Writ of Certiorari to the Rhode Island Supreme Court

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50 pp

Questions Presented.

I. Whether the executive director of the Lincoln Housing Authority of Lincoln, Rhode Island had the right to fire the respondent for insubordination, notwithstanding the fact that she claims to have protected speech in non-public areas that deal with the authority.

II. Whether the housing authority, as a review board, can be said to set policy and be liable because it ratified the actions of the firing of the respondent by the executive director, after affording the respondent a full hearing and which determination became final because of the failure of the respondent to seek required appellate relief.

Table of Contents

Questions presented i

Table of authorities cited iii

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement of the case 2

Ruling below 6

Reasons for granting the writ 8

Argument 9

I. The executive director of the Lincoln Housing Authority of Lincoln, Rhode Island had the right to fire the plaintiff for insubordination, notwithstanding the fact that she claims to have protected speech in non-public areas that deal with the authority 9

II. The Housing Authority, as a review board, cannot be said to set policy and be liable because it ratified that actions of the firing of the plaintiff by the executive director, after affording the plaintiff a full hearing and which determination became final because of the failure of the plaintiff to seek appellate relief 12

Conclusion 14

Appendix follows page 14

Table of Authorities Cited.

CASES.

Armstrong v. Manzo, 380 U.S. 545 (1965) 13

Connick v. Myers, 461 U.S. 138 (1983) 8, 9, 11

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 13

Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977) 8, 9, 10, 11

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 8, 12, 13, 14

Rankin v. McPherson, U.S. , 107 S.Ct. 2891 (1987) 8, 9, 11

St. Louis v. Praprotnik, U.S. , 108 S.Ct. 915 (1988) 8, 12, 13, 14

CONSTITUTIONAL PROVISIONS.

United States Constitution

First Amendment 9, 10, 11

STATUTES.

United States Code

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 2, 8, 12

MISCELLANEOUS.

Shakespeare, *Julius Caesar*, I, ii, 134 13

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Opinions Below

The opinion of the Rhode Island Supreme Court, dated July 6, 1988 is printed in Appendix B hereto, at 19a. The decision of the trial court is printed in Appendix A hereto, at 1a.

Jurisdiction

The judgment of Rhode Island Supreme Court in Appendix B, *infra,* was entered on July 6, 1988, in an opinion published

as 544 A.2d 576 (1988). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Statute Involved

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

In late 1980, the Lincoln Housing Authority was administering essentially three programs: Housing for the low income; Housing for the Elderly; and Section 8 housing. The first two programs were residential programs; the authority had its own residential facilities. The Section 8 program was a program administered through private landlords. The authority would finance leases for low income families with a private landlord.

The staff of the Lincoln Housing Authority consisted of three people: the executive director; an assistant executive director; and a secretary/bookkeeper. The authority was administered

by a board of five commissioners. Carol Kennedy (a major witness) had been the secretary/bookkeeper.

The assistant executive director was leaving, and Carol Kennedy moved up to her position. The plaintiff Amy Adler applied for the secretary/bookkeeper vacant position in December 1980. There were nine or ten other applicants. The defendant John Palma hired plaintiff and the board of commissioners voted to ratify her job as secretary/bookkeeper. Plaintiff was the daughter of Robert Custis, the chairman of the board of commissioners.

For two or three months she was trained by Carol Kennedy. Although there were job descriptions in the personnel policy, it really was up to the executive director to tell the employees what to do. The relationships between the three were pleasant and cordial for a period of time.

The prior assistant executive director, Christine, had left to take a job with another housing authority. Before leaving, she and Mr. Palma had become romantically involved. Mr. Palma had asked Carol Kennedy (a friend of Christine's) to intervene on his behalf with Christine. Kennedy declined. The office then changed. Mr. Palma became antagonistic towards Mrs. Kennedy in the day-to-day operations of the authority. He called her in several times and scolded her; stated that her work was not good; she was incompetent; he ought to fire her; and at some later times would not talk to her at all. At other times, he would issue orders to Carol Kennedy by making a statement to Amy Adler to relay the message to Carol Kennedy on some directive when Carol Kennedy was right there in the room. Kennedy became disgruntled; she wanted to keep the job, but she did not like the working conditions. She then went to Robert Custis (plaintiff's father and chairman of the board) privately at his summer home to complain. Chairman Custis called a meeting of the commissioners at which Kennedy was

present. There was a discussion of these personnel problems. Mrs. Kennedy was clearly told that Mr. Palma was the boss and she had to abide by that, but that Custis and Arcand, the vice-chairman, would have a meeting the following morning with the office staff to smooth things over. That meeting did take place. Present were Messers, Custis, Arcand, Palma, Kennedy and Adler. It was again made clear at that meeting, that Kennedy and Adler were not to contact the commissioners with their grievances, but were to submit them through Palma.

Sometime later, the situation worsened in the office. Adler also became subject to this type of treatment. In early October 1981 (about four months after the meeting), plaintiff became dissatisfied with the way Mr. Palma was performing his functions. She did not like the silent treatment. She did not like his moods. She then chose to violate the directive of the commissioners and went to her father, the chairman of the commissioners, and told him about her grievances privately. She also told him that she had suspicions that some of Mr. Palma's conduct was wrongful. He was in the office too little. She did not know what he was doing. Palma was not available to her and Kennedy. He did not tell them where he was going; that Palma had sold his home in Wickford and was sleeping at the office, which had apartment facilities; and that apparently he had been using the authority gas credit card, for his private automobiles as well as the authority's truck. She was also suspicious of some telephone bills for long distance calls that were made after hours. She also mentioned to her father that there were complaints from the tenants because Mr. Palma had brought some of his personal furniture and stored it on the premises and used the authority's truck for that purpose. She also complained that Mr. Palma had two registered cars and one unregistered car using up three of the six authority spaces at the office. She also complained that tenants were making complaints that the craft room was locked. Finally,

she said that Mr. Palma had violated the protocol on the waiting list for Section 8 tenants by jumping some people ahead of others.

Coincidentally, just before this time, Mr. Custis had been in a dispute with Mr. Palma. Mr. Palma had made public allegations about Mr. Custis using maintenance personnel of the authority at his home and summer residence.

As a result of her private meeting with her father, she then started keeping a diary on Mr. Palma, during office hours. She kept track of when he came in and when he went out; she even totalled the hours and minutes he spent in the office in that daily diary. She assembled photostatic materials on the use of gas credit cards.

In early January 1982, Mr. Custis called a meeting of the commissioners to consider these allegations. Mr. Palma wrote out a response to all these allegations. Mr. Arcand and Mr. Custis and the other commissioners heard the allegations and backed him up. He was straightforward with the commissioners. He told them he had been staying at the authority offices for a period of time and vowed that this would not continue. He admitted to the use of the gas credit card and agreed to make restitution for what little gas he had charged on personal business. He admitted that he had used the truck to carry some furniture back up this way from Wickford. The long distance telephone calls were a mistake of the telephone company. The tenant complaints were never verified, and there was never a determination made that Mr. Palma did anything wrong in placing some people into Section 8 or any other type of housing from within the lists, or from near the bottom of the lists.

The following month, Mr. Palma decided to reorganize the work functions within that office. He told Carol Kennedy that commencing the following Monday, Amy Adler was not to handle Section 8 matters. Kennedy asked why and he respond-

ed that he did not have to tell her why. Carol Kennedy relayed the information to Amy Adler. Adler considered this a demotion; but her pay was not being diminished. Adler never gave Mr. Palma an opportunity to issue those directives because she challenged his order immediately. She wanted to know why this was being done. He gave her the same answer that he had given Kennedy, that he "didn't have to tell her why." Then she stated that she wanted to file a grievance with the commissioners through him, and he said "Denied." He asked her if she was challenging his authority. She indicated she was going to go to the commissioners. He then told her that she was fired. However, she stayed around the office the rest of the day and tried to reach the commissioners. She reached one. He told her to file a written grievance with the commissioners and they would take it up. She kept coming back to work. On February 5, 1982, Mr. Palma wrote a letter of termination and handed it to her which sets forth the grounds for her termination. She then left.

The commissioners had a hearing on this matter on March 18, 1982. Plaintiff was represented by counsel. They took the matter under advisement for insubordination, and later decided to uphold Palma's dismissal of the plaintiff. Plaintiff did not properly seek to appeal the decision, and it became final.

Ruling Below

Housing Authority

Plaintiff filed several grievances with the commissioners relative to being fired and the reasons therefor. She was represented by counsel. The witnesses were examined under oath.

A witness was subpoenaed. The testimony was taken down by a court stenographer. A full hearing was heard with full examination and cross-examination of the witnesses.

After full hearing, the matter was taken under advisement. A written decision was handed down. The housing commissioners found the plaintiff to be guilty of gross insubordination; and devisive; and improper conduct — based upon the evidence — and upheld the firing.

Rhode Island Superior Court

Plaintiff then filed a two-count complaint with the Rhode Island Superior Court. The first count sought to appeal and reverse the decision of the housing commissioners in upholding her firing. The second count sought relief under the Civil Rights Act.

A motion to dismiss the first count was granted. As a result of the first count dismissal, and the failure of the plaintiff to perfect her appeal; the decision of the housing authority upholding the firing became final.

Plaintiff then filed an amended complaint, adding a new count for civil rights, conspiracy by the housing commissioners with defendant Palma, and also another new count for emotional distress.

Thereafter, the civil rights counts and the emotional distress count were heard before a judge and jury for six successive trial days from August 17, 1986 to August 26, 1986. At the end of the plaintiff's case, the court found no civil rights violations by any of the defendants. It found no claim for emotional distress. The trial court then entered judgment for defendants.

Rhode Island Supreme Court

The Rhode Island Supreme Court found the trial judge to be in error in dismissing the § 1983 claim against the authority and Palma. It agreed with the trial judge that there was a "complete (dearth) of evidence" to prove the conspiracy. It also agreed that the plaintiff failed to prove any entitlement to recovery for emotional distress. The plaintiff did not seek to raise the issue of the dismissal of the claim for judicial review of the decision of the housing authority nor did she raise it during argument. She waived it.

Reasons for Granting the Writ

I. The Rhode Island Supreme Court has misinterpreted the Civil Rights Act relative to the firing of quasi-public employees in a way that conflicts with the Court's decision in *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977); *Connick* v. *Myers*, 461 U.S. 138 (1983); and *Rankin* v. *McPherson*, U.S. , 107 S.Ct. 2891 (1987).

II. The Rhode Island Supreme Court has misinterpreted the Court's ruling on municipal liability under the Civil Rights Act for a single decision creating liability under *Pembaur* v. *Cincinnati*, 475 U.S. 469 (1986); and *St. Louis* v. *Praprotnik*, U.S. , 108 S.Ct. 915 (1988).

Argument

I. THE EXECUTIVE DIRECTOR OF THE LINCOLN HOUSING AUTHORITY OF LINCOLN, RHODE ISLAND HAD THE RIGHT TO FIRE THE PLAINTIFF FOR INSUBORDINATION, NOTWITHING THE FACT THAT SHE CLAIMS TO HAVE PROTECTED SPEECH IN NON-PUBLIC AREAS THAT DEAL WITH THE AUTHORITY.

In *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977), this Court held that the plaintiff must demonstrate that the speech was protected by the First Amendment and also that complained of conduct was the substantial or motivating factor in the firing decision.

After hearing the plaintiff's full case, the trial judge found the plaintiff's talks, which were with her father, were clearly private and surreptitious (App. A at 14a, 15a). The trial judge also found her statements largely erroneous, based on speculation although some were true, and her main reason was either to have defendant fired or run the office as she wanted it run (App. A at 16a).

The trial judge also found as a matter of law that the plaintiff's communications to her father, which ultimately reached all of the commission was not constitutionally protected free speech.

The trial judge also found her conduct clearly disruptive of the proper functioning believed of a superior and subordinate (App. A at 16a).

The Supreme Court was of the opinion from their examination of the record testimony and record evidence that "[p]laintiff's comments address a matter of public concern" and is entitled to First Amendment protection; under their reading in *Mt. Healthy, Connick* and *Rankin, supra*.

The Rhode Island Supreme Court found the private meeting between the plaintiff and her commissioner father (who was at odds with Mr. Palma) did not cause her to lose First Amendment protection status and showed that she exercised restraint.

The Supreme Court made no comment upon the trial judge's finding that the plaintiff's conduct was not protected but was clear insubordination and warranted immediate firing.

The plaintiff, after having been clearly told by the commissioners to file grievances through Mr. Palma, decided to challenge Mr. Palma's authority by going to the commissioners rather than through him. This had nothing to do with any free speech. It dealt only with a dispute between Mr. Palma and the plaintiff over the right of a superior to delegate work. The trial judge found this was not protected conduct and the Supreme Court, for some reason, ignored the crucial aspect of the case, which is the centerpiece for the reasons of the firing.

There is nothing in the decision of the Rhode Island Supreme Court to warrant any finding from the "cold record" that the plaintiff's firing was the result of the complained conduct as required by the *Mt. Healthy* decision.

Plaintiff may have felt she received a "demotion" but the record is clear she did not. Her pay and hours were the same. The items that she was to work on, inside the office, were changed. Plaintiff tried to ask defendant why her work duties were changed and he said that "I don't have to answer to you." This is the same response he had given to Kennedy earlier. Plaintiff then decided to contact the commissioners. This was against established policy. He told her not to. She refused his orders. It was after this point that he told her she was fired. Kennedy, who was part and parcel of the spying and reporting on Palma, was never fired. The evidence established, as found by the trial judge, that plaintiff was fired because she had no right to tell her superior, Mr. Palma, how to run his office and because she failed to follow established office grievance procedure.

In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court held that the First Amendment does not permit disruptive office procedure which undermines authority and destroys a close working relationship.

The trial judge, who heard the evidence, and saw the witnesses, had no trouble in finding that plaintiff's actions, which resulted in her being fired, disrupted office procedure, undermined authority and destroyed a close working relationship. The housing commissioners, whose decision became final (because of the plaintiff's review in the wrong judicial forum), found gross insubordination and devisive and improper conduct on the part of the plaintiff.

The trial judge also fulfilled his duty under *Rankin* v. *McPherson*, U.S. , 107 S.Ct. 2891 (1987), when he found, in a lengthy decision, that the complaints to her father were not of public concern but were "private expressions" that were "surreptitious," "devious," and "largely erroneous," seeking to have her father (chairman of the board) intervene to make "Mr. Palma knuckle under to her demands and run the office as she wanted it run" (App. A at 14a-15a).

The trial judge clearly followed the teachings of this Court in *Mt. Healthy*, *Connick* and *Rankin*, *supra*. He weighed the scales and found the balance to be lacking.

The Rhode Island Supreme Court, reading from a "cold record" and not having the opportunity to see the witnesses, found that seeking one's father to intervene against one, who had filed a complaint against him, was within the ambit of protected speech. The mere fact that the plaintiff refused to follow orders and challenged the authority of her superior is of no consequence in the area of protected speech. The decision of the Rhode Island Supreme Court is at odds with the holdings of this Court in the area of civil rights actions under the federal statute.

II. The Housing Authority, as a Review Board, Cannot Be Said to Set Policy and be Liable Because It Ratified that Actions of the Firing of the Plaintiff by the Executive Director, After Affording the Plaintiff a Full Hearing and Which Determination Became Final Because of the Failure of the Plaintiff to Seek Appellate Relief.

The Rhode Island Supreme Court in its interpretations of *Pembaur* v. *Cincinnati*, 475 U.S. 469 (1986) and *St. Louis* v. *Praprotnik*, U.S. , 108 S.Ct. 915 (1988), held that a single decision by a *review board* is enough to establish § 1983 liability on the housing authority.

The *Pembaur* and *St. Louis* decisions, however, deal with single decisions that are final, in the first instance, not with cases that are subject to judicial review in the state court system.

This case, unlike *Pembaur* and *St. Louis*, deals with a quasi-judicial review board, whose decision is *not* final, but was subject to appellate review.

The plaintiff — after having her termination for gross insubordination and utter disregard of policy rules — sought appellate review. Unfortunately, she sought judicial review in the wrong court. She should have sought judicial review in the Rhode Island Supreme Court, not the Rhode Island Superior Court. In bringing her claim in the wrong court, she claimed in Count I of her complaint that the decision of the Lincoln Housing Authority was, *inter alia*, "in excess of statutory authority," "made upon unlawful procedure," "clearly . . . in view of the whole record . . . arbitrary," "an abuse of discretion."

This count was dismissed by the Superior Court because plaintiff should have sought this relief and claim of judicial review by "Writ of Certiorari" to the Rhode Island Supreme Court.

Plaintiff did not appeal the dismissal by the Superior Court at the time of the ruling. Nor did she raise this issue when the case was argued before the Rhode Island Supreme Court after the remainder of the case was tried.

Plaintiff cannot now claim or argue that the termination of her judicial review of the decision of the housing authority — by filing in the wrong court — violates due process. Such a review requirement is a "reasonable procedural rule." See, e.g., *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

The decision, therefore, only became final because the plaintiff failed to properly perfect her review rights. The decision would have been in no way final had she properly perfected her judicial right to review. "The fault . . . is not in . . . [the] stars . . . [b]ut in" the plaintiff for failing to protect her right of review. Shakespeare, *Julius Caesar* I, ii, 134.

The Rhode Island Superior Court clearly misinterpreted this Court's meaning of a final decision under *Pembaur* and *St. Louis, supra,* required to impose policy liability on a municipality or quasi-municipality.

In the instant case, plaintiff was afforded a full hearing before the housing authority. She was represented by counsel. Witnesses were sworn. A court stenographer took down all of the evidence and testimony. A full record was made. The housing authority sat only in a quasi-judicial position. They set no policy. They merely heard the evidence, listened to counsel and rendered a reviewable decision.

Respondent failed to seek proper judicial review of the decision. Her failure to file established judicial procedure cannot ignite liability to the housing authority under the *Pembaur* and *St. Louis* holdings by this Court.

To paint a wide brush under the colors of *Pembaur* and *St. Louis* to portray an image that a party who fails to comply with judicial procedure and makes an otherwise reviewable de-

cision final can trigger municipal liability under the single final decision policy is not only an abstract painting, it is untenable. *Pembaur* and *St. Louis* were never intended to be stretched to a situation where "sandbagging" a review board by claiming its decision is final is allowed by the defaulting party. To hold otherwise is to invite the end of municipal quasi-judicial review boards.

Conclusion

For the foregoing reasons, defendants respectfully request that the decision of the trial judge be reinstated and that the decision of the Rhode Island Supreme Court be reversed and that judgment be entered for and in behalf of the defendants.

Respectfully submitted,

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Appendix

Table of Contents

Appendix A

The Decision of the Trial Judge 1a

Appendix B

The Opinion of the Rhode Island Supreme Court 19a

Appendix A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

AMY ADLER

vs. CA 82-2045

LINCOLN HOUSING AUTHORITY, et als

Volume II

HEARD BEFORE MR. JUSTICE LAGUEUX AND A JURY ON AUGUST 25, 26, 1986.

Appearances:

JOSEPH F. PENZA, JR., ESQ. ..... FOR PLAINTIFF
EDWARD J. MULLIGAN, ESQ.
M. DURKAN CANNON, ESQ. ..... FOR DEFENDANTS

[356]

August 26, 1986

THE COURT: The record will indicate the jury is not present because I am about to render a decision on the motion of all defendants for a directed verdict following presentation of the plaintiff's case. I am mindful of my duty under the law in deciding a motion of this type. I have to view the evidence in a light most favorable to the plaintiff and draw all reasonable inferences in favor of the plaintiff. However, that rule is largely academic in this case because the basic facts and essential facts in this case are undisputed. There has been a lot of evidence introduced on the periphery of the main issues, and much superfluous discussion; but I will zero in on the facts that get us to the jugular vein of this case. The plaintiff is Amy Adler, a former employee of the Lincoln Housing Authority. In her Amended Complaint, which is the operative complaint in this case at the present time, she makes two claims. In the first count she claims that the Executive Director of the Authority, John Palma, terminated her employment because she exercised her First Amendment right of free speech; and that the five Commissioners of the Authority, Arcand, Stonely, McVeigh, Moone, and Robbins conspired with Palma to achieve this result. She also makes the Lincoln Housing [357] Authority a defendant apparently on the theory that the Commissioners were enforcing a policy of that body, thus making the Authority itself liable. In the second count she sues under State law. She alleges, in effect, that Mr. Palma intentionally inflicted mental distress upon her, a State tort, and she seeks to recover compensatory and punitive damages against him in that second count. In the first count, which is under the Civil Rights Act, so called, 42 U.S. Code Section 1983, she seeks to recover compensatory damages against all defendants and punitive damages against Palma. It is interesting to note that

in this complaint she does not seek reinstatement with back pay as is normally the case in these Civil Rights, First Amendment cases. To understand the case it is necessary to start at the beginning and discuss the facts that have been established. In late 1980 the Lincoln Housing Authority was administering essentially three programs, Housing For The Low Income, Housing For The Elderly, and Section 8 Housing. The first two programs were residential programs, that is to say, the Authority had it's [*sic*] own residential facilities. The Section 8 Program was a program administered through private landlords. In other words, the Authority would finance leases for low income families with a private landlord. All of these **[358]** programs derived their funds from the Federal Government. The Lincoln Housing Authority is a species of municipal corporation. It was formed under a State law and operates as a tangential arm of a municipality, the Town of Lincoln, Rhode Island. In this case, of course, it was formed to take advantage of all these federal funds. So, for purposes of this case it is a municipal corporation. In late 1980, and for some time before that, the staff of the Lincoln Housing Authority consisted of three people, the Executive Director, an Assistant Executive Director, and a Secretary/Bookkeeper. The Authority was administered by a Board of five Commissioners. Carol Kennedy had been the Secretary/Bookkeeper. There was also another title in the personnel job description, Leased Housing Manager, and Carol Kennedy was performing that function; in other words, she was administering the Section 8 Program, interviewing potential tenants, working on leases, and so forth. The Assistant Executive Director was leaving. She had been administering the other two programs, primarily, under the direction of the Executive Director. So, Carol Kennedy moved up to the position of Assistant Executive Director, and there was a vacancy. The plaintiff, Amy Adler, applied for that vacant position in December 1980. There were nine or ten

[359] other applicants. We don't know their qualifications; we haven't heard anything about their capabilities in handling this position. But, we do know that Amy Adler got the job and the Board of Commissioners voted to give her the job of Secretary/Bookkeeper. It just so happens that Amy Adler was the daughter of Robert Custis who was the Chairman of the Board of Commissioners. Also, it appears from the evidence that the Vice-Chairman, Armand Arcand, had a wife that held the position of Secretary/Bookkeeper before Carol Kennedy came on board. So, we can say with some degree of certitude that at that time nepotism was alive and well in the Lincoln Housing Authority. The plaintiff secured her position officialy [*sic*] on January 26, 1981. For the first two or three months she was trained in her new position by Carol Kennedy. Although there were job descriptions in the personnel policy, this was such a small staff and those job descriptions really didn't mean much. It really was up to the Executive Director to tell the employees what to do. It turns out that Mr. Palma was a great delegator; he really didn't care much about office work, and he let Carol Kennedy do pretty much what she wanted at that time. So, Carol Kennedy, not knowing anything differently, really took over the job that the prior Assistant Executive Director had done, namely [360] administering The Low Income and Housing For The Elderly programs, and trained Amy Adler in the job that she previously had been doing, which was the bookkeeping work, the paying of invoices, and the administration of the Section 8 Program. The relationships between the three were pleasant and cordial for a period of time, and the "Days of Our Lives" in Lincoln were calm until romance reared its ugly head. A prior Assistant Executive Director, "Chris" as she has been referred to here, had left to take a job with the Cumberland Housing Authority. Obviously, before she left, she and Mr. Palma had become romantically involved. Now, Mrs. Kennedy was a friend of

Christine's and was working for Mr. Palma, and as so often happens the ways of love do not always run smoothly. Mr. Palma was having problems in his love life and he asked Carol Kennedy to intervene on his behalf because Christine was vowing never to see him again. Carol Kennedy, using poor judgment, declined to intervene, because that put her right in the middle between a friend and a boss. So the situation changed dramatically. Mr. Palma became antagonistic towards Mrs. Kennedy in the day-to-day operations of the Authority. According to her testimony, which was not contradicted, he called her in several times and scolded her; stated that her work was not good; she was **[361]** incompetent, and he ought to fire her. Then he would respond at some later times with the old silent treatment and not talk to her at all. At other times, he would issue orders to Carol Kennedy by making a statement to Amy Adler to relay the message to Carol Kennedy on some directive when Carol Kennedy was right there in the room. Now this was all very petty stuff, but the fact of the matter is, Mr. Palma was the boss and in public employment, at times, public employees must work for petty dictators. Carol Kennedy became disgruntled; she wanted to keep the job, but she didn't like the working conditions at that point. So lo and behold she went to Robert Custis privately at his summer home to complain about the treatment she was receiving. Apparently Amy Adler on the surface of all this had nothing to do with that particular communication. Custis called a meeting of the Commissioners at which Kennedy was present and there was a discussion there of these personnel problems. The upshot of it was that Mrs. Kennedy was told in no uncertain terms that Mr. Palma was the boss and she had to abide by that, but that Custis and Arcand, the Vice-Chairman, would have a meeting the following morning with the office staff to smooth things over. That meeting did take place; present were Custis, Arcand, Palma, Kennedy and Adler. One thing **[362]** was made

very clear at that meeting and that was that these two employees, Kennedy and Adler, were not to be skirting right and left end to the Commissioners with their gripes and grievances; that if they had a work-related grievance they were to submit it through Palma to the Commissioners so that everything would be right out there in the open, right up front. Whether that was an official policy of the Lincoln Housing Authority I don't know, but it should have been clear at that time to both Kennedy and Adler that the Commissioners were not going to stand for this backbiting technique of going around the Executive Director and complaining privately to Commissioners. According to Kennedy and Adler thereafter the situation worsened in the office. Mr. Palma would turn it on and off; one day he would speak to the employees and another day he wouldn't. There is not much question that he was a moody person at that time, and probably because of his love life. According to Adler and Kennedy, Adler became the butt of the silent treatment. Also, at times, he wouldn't allow her to pass through his office door. Other minor relationship problems occurred, all of this being quite picayune. I fail to see why Adler and Kennedy were so concerned, because according to them Palma wasn't around much anyway. He was tending to **[363]** other affairs; they thought personal matters. They weren't sure on what Lincoln Housing Authority matters he was working on at the time, apparently, because he was not a very communicative man. He wouldn't tell them what he was working on, and he happened to like maintenance work, supervising maintenance work, leaving the office to the ladies. In any event, as we get into early October 1981 Amy Adler became dissatisfied with the way Mr. Palma was performing his functions. She doesn't like the silent treatment. She doesn't like his inconsistent moods, and so she chose to violate the directive of the Commissioners. She went to her father who happened to be the Chairman of the Commissioners. She told him about

her grievances, privately. She also told him that she had suspicions that some of Mr. Palma's conduct was wrongful. First of all, she thought he was in the office too little, and wasn't spending enough time there. She didn't know what he was doing; she didn't like that. She also complained that Palma wasn't available to her and Kennedy when they wanted the answer to some problem because he didn't tell them where he was going when he wasn't in the office. Apparently in her mind there were matters that needed immediate attention and wouldn't wait until the next day when Mr. Palma would be in, for at least part of the day. She **[364]** complained that Palma had sold his home in Wickford and was sleeping at the office where there were kitchen facilities, a shower, and a roll-away bed. She recited that she had caught him there sleeping in that bed when she came into work on some mornings. She also complained that apparently he had been using the Authority gas credit card, she thought, for his private automobiles and also the Authority truck. She was also suspicious of some telephone bills for long distance calls that were made after hours. She jumped to the conclusion since Mr. Palma was sleeping there at times he must have been making those calls, especially those to Dallas, Texas. She also alleged to her father that there were complaints from the tenants because Mr. Palma had brought some of his personal furniture and stored it on the premises and used the Authority truck for that purpose. She complained that Palma's use of a truck meant that it was not always available to help out tenants who needed things moved. She also complained that Mr. Palma had two registered cars and one unregistered car using up three of the Authority spaces at the office. There were six spaces there in all. She also complained that tenants were making complaints that the craft room was locked. That was never really elaborated upon. Finally, she said that Mr. Palma had **[365]** violated the protocol on the waiting list for Section 8 tenants by jumping

some people ahead of others. There is no question that he had to make the final determination on that subject, considering a number of factors, some of which Amy Adler knew nothing about. Now, this was a surreptitious meeting, and after Amy Adler had made all of these things known to her father -- and this is the free speech that we are going to be talking about later -- he said "Document your charges and then we'll do something." It is also interesting that before that time Mr. Custis had been in a dispute with Mr. Palma. Mr. Palma had made public allegations about Mr. Custis using maintenance personnel of the Authority at his home and summer residence. Now we begin to see what some of the motivation here may have been. So, Amy Adler became the spy who came in out of the cold. She started keeping a diary on Mr. Palma, during office hours. She kept track of when he came in and when he went out; she even totaled the hours and minutes he spent in the office in that daily diary. She assembled photostatic materials on the use of gas credit cards. In fact, she even went back to 1978 to make up an exhibit which purported to show increased use of fuel over the years, apparently in an attempt to show that the increased use had to be attributable to Mr. Palma's **[366]** private use of Authority vehicles. She photostated the telephone bills and jumped to the conclusion that Mr. Palma was responsible for these after-hour calls. That was the primary documentation for her allegations, and then she went back to her father with this material. So, in early January Mr. Custis, who was on his way out as a Commissioner (the handwriting was on the wall) called a meeting of the Commissioners to consider these allegations. It isn't clear when Mr. Custis was replaced from the evidence in this case, but according to Mr. Arcand by March 18th when there was a hearing, Mr. Arcand was then acting as Chairman. At the January meeting of the Commissioners these Adler allegations were all brought forward. Apparently Mr. Palma had been notified

by the Chairman some time before that, in either late December or early January, that these allegations were being made. As best he could, Mr. Palma determined what the allegations were and wrote out a response to all those allegations. It became readily apparent to the Commissioners that most of these allegations were unfounded. Apparently Mr. Arcand and Mr. Custis and the other Commissioners didn't think that Mr. Palma was such a bad administrator because they backed him up. He was perfectly straightforward and honest with the Commissioners. He told them he had been **[367]** staying at the Authority offices for a period of time and vowed that this would not continue. He admitted to the use of the gas credit card and agreed to make restitution for what little gas he had charged on personal business. He admitted that he had used the truck to carry some furniture back up this way from Wickford.

Adler charges that Mr. Palma spent too little time in the office certainly didn't carry the day. No one on the Commission seemed concerned about that. It turned out that the long distance telephone calls were a mistake of the telephone company; it was *Ma Bell* who made restitution. The tenant complaints were never verified, and there was never a determination made that Mr. Palma did anything wrong in placing some people into Section 8 or any other type of housing from within the lists, or from near the bottom of the lists. So, what came to light and was made public before the Commissioners was a situation where an employee Mr. Palma had to work with day in and day out, Adler, had not only made false accusations against him but had spied on him, and been grossly disloyal. On February 2, 1982 Amy Adler was still an employee of the Authority. It isn't clear why. There were sufficient grounds to dismiss her by that time for her gross insubordination, **[368]** and violation of the lines of communication within the Authority, and for her disloyal conduct towards her superior. I won't speculate as to why she was still there. Apparently her father

was still Chairman of the Commission. He was soon to be gone. On February 2, 1982 Mr. Palma decided to reorganize the work functions within that office. He told Carol Kennedy that commencing the following Monday Amy Adler was not to handle Section 8 matters. Kennedy asked why and he responded that he didn't have to tell her why, which was absolutely so. Carol Kennedy then relayed the information to Amy Adler. According to Adler's testimony she considered this a demotion; Palma was taking away 85 percent of her work, according to her; but her pay wasn't being diminished. It should have been obvious to any reasonable person working in the office that other functions in the office were going to be redistributed between Kennedy and Adler. But, Adler never gave Mr. Palma an opportunity to issue those directives because she challenged his order immediately. She wanted to know why this was being done. He gave her the same answer that he had given Kennedy. Then she stated that she wanted to file a grievance with the Commissioners through him, and he said "Denied." He asked her if she was challenging his authority. It was **[369]** clear that she was. She indicated she was going to go to the Commissioners. He told her several times, according to her, that she was fired. She stayed around the office the rest of that day using her lunch hour to try to reach the Commissioners. She reached one. He told her to file a written grievance with the Commissioners and they would take it up. She kept coming back to work, so on February 5th Mr. Palma wrote a letter of termination and handed it to her which sets forth the grounds for her termination. She cleaned out her desk and left. The Commissioners had a hearing on this matter March 18, 1982; they took the matter under advisement and then later decided to uphold Palma's dismissal of the plaintiff. This suit followed.

An attempt was made in the original complaint to bring the matter to Court under the Administrative Procedures Act. Plaintiff asked the Court to make a determination as to whether the dismissal was proper. Another Judge of this Court ruled rightly that the Administrative Procedures Act didn't apply -- the Administrative Procedures Act only applies to State Boards and Commissions. If plaintiff wanted to exercise her right of appeal in this matter she should have proceeded to the Rhode Island Supreme Court by way of Certiorari. She didn't do that, so her dismissal became **[370]** final. She brought this Civil Rights action claiming that her dismissal was due to her exercise of free speech rights under the First Amendment, and that a substantial motivating factor for her dismissal was her exercise of free speech. Let me dispose of the other claims first.

The second count, as I have indicated, charges that Palma intentionally inflicted mental distress upon her and that is a claim under state law. There are two Rhode Island cases which are helpful in this area, *Bedard vs. Notre Dame Hospital,* 89 Rhode Island, 195 decided in 1958, which holds that in order to have a recovery for mental anguish or mental distress such condition must be followed by physical ills as a natural consequence. That is the law of Rhode Island to this date and it has never been changed. There is a minority view in a couple of States, but I must presume that the Rhode Island Supreme Court will continue to follow established Rhode Island law in this area. The plaintiff has utterly failed to prove that any physical ills resulted to her from the mental distress of being fired. The other instructive case is *Champlin vs. The Washington Trust Company* which is reported in 478 A2d, 985, decided in 1984. That was the case in which a bank was dunning the plaintiff for what she claims were her **[371]** husband's debts. The Supreme Court made it clear, in that case, as it did in the *Bedard* case, that in order to have recovery for mental distress followed by physical ills there has to be a wrong

under State law; there has to be a tort. In this case, there has been no wrong committed. Mr. Palma had the right to fire Mrs. Adler under State law; he exercised that right; he was upheld by the Commissioners. That matter became final. Amy Adler was in an employment at will and could be fired at any time. So, under State law no wrong was committed in this case, and plaintiff obviously has no right to recover under Count 2. Therefore, the Clerk will enter judgment for the defendant Palma on Count 2.

Now, under Count 1 as I previously indicated, the plaintiff sued the members of the Commission who run the Authority on the theory that they conspired with Mr. Palma to terminate her services. She never proved, during this case, that the Commissioners conspired with Mr. Palma, that is, agreed with Mr. Palma beforehand to terminate her employment because she exercised her First Amendment rights. There is a complete dirth [*sic*] of evidence on that issue and, therefore, the Clerk will enter a judgement for the individual Commissioners under Count 1.

The Lincoln Housing Authority was also made a [372] party. Plaintiff's counsel concedes that in order for recovery to occur under the Civil Rights Act there has to be a policy of the Authority which violated the constitutional rights of the plaintiff. It is clear here that the Commissioners, in upholding the dismissal of the plaintiff, were *not* establishing a policy for the future to the effect that employees of this Authority will be terminated and fired if they exercise their rights of free speech. The *Pembaur* decision cited to me by plaintiff's counsel is inapplicable to the facts of this case. So, a verdict must be directed for the Lincoln Housing Authority.

That leaves us with but one defendant, John Palma. Now, I must make a determination of whether there is sufficient evidence to go to the jury on whether Mr. Palma terminated the plaintiff in retaliation for her exercise of her right of free

speech under the Constitution. The plaintiff here has two burdens, number 1, she must show that her speech and her conduct in this area is constitutionally protected; and number two, that the exercise of that constitutionally protected speech was a substantial or motivating factor in the decision of the defendant to terminate her employment. I have stated to counsel during arguments that the first issue is where the horse is buried in [373] this case. That is the issue which determines the outcome of this case. Was Amy Adler, when she was making allegations about Mr. Palma's conduct to her father exercising constitutionally protected free speech? The law in this area is somewhat hazy because the decisions have come down on a case to case basis. The U. S. Supreme Court has not attempted to draw a clearly black line between what is protected and what isn't. I think we can cite some extremes. The U. S. Supreme Court case of *Lamontagne Healthy City Board of Education vs. Doyle*, 429 U.S., 274 decided in 1977 shows one extreme of constitutionally protected free speech. That was a case of a school teacher, untenured school teacher, who made phone calls to one of these radio call-in shows discussing various policies in the school system in which he was employed. The Supreme Court held that was clearly constitutionally protected free speech and since it was found that plaintiff was dismissed because of that he was entitled to reinstatement with back pay. That was a violation of the Civil Rights Act. Now I think we can visualize some cases at the other extreme where an employee, a public employee, makes unfounded, slanderous, derogatory remarks about his or her immediate superior at a cocktail party to friends and relatives. If the superior then finds out about it [374] and fires the employee on the spot, clearly there would be no recovery under the Civil Rights Act. That would not be constitutionally protected free speech. In fact the U. S. Supreme Court has said that when a citizen is a public employee, the interest of that employee, as a citizen, in commenting

on matters of public concern must be balanced against the interest of the government as an employer in promoting the efficiency of the public service that it performs through its employees. So it isn't always open season on superiors by subordinates in the public sector the free speech area. The U. S. Supreme Court has given us some factors to consider in determining whether the speech is protected or not. The Court has stated that *usually* critical comments on matters of public concern which are substantially correct are protected by the First Amendment and may not furnish grounds for an employee's dismissal, but that an evaluation of factors may dictate a different result. One of the factors to be considered is whether the speech was directed against a person with which the plaintiff has regular contact in employment so that it might impede harmony among co-workers. Another factor is whether the plaintiff's activity has a detrimental impact on those with whom that employee must maintain personal loyalty and confidence for the fulfillment of [375] that employer's responsibilities. Then there is a very vital factor i.e. whether the statements were erroneous or unsubstantiated, or just plain gossip. Another key factor is whether or not the speech is essentially private rather than a public expression of views and comments. Of course, whether it is private depends on time, place, and manner, and whether the speech concerns matters of public concern, or whether the speech relates to a matter of private concern. Well, here Amy Adler's talks with her father were clearly private and surreptitious, and contrary to the established rules of communication established within the Authority. What she was doing, when it was later discovered by Mr. Palma through the Commissioners, served to destroy the harmony within that office. How could Mr. Palma continue to work with this woman as a subordinate when she had been spying on him and surreptitiously and deviously made communications to her father about his conduct? As I have already indi-

cated, her conduct was disloyal to her superior with whom she had to work on a daily basis. In addition, her statements were largely erroneous. Most of her complaints were based on speculation, and were sheer allegations, unsupported as it turned out, at a later time. A couple of matters were true, readily admitted by Mr. Palma i.e. the use of gas credit cards, **[376]** the use of the truck and sleeping in the office. Taken all together, her complaints could hardly be said to be of a vital nature and of public concern. They were matters of concern to the Commissioners and the Executive Director. It was really none of her business as to what the relationship was between Mr. Palma and the Commissioners on when he was to perform his functions; where he was to spend his time, and how he was to perform his functions, whether in the office or out of the office, or how much authority he would delegate to his subordinates, or how he would act towards his employees when in the office. I can only conclude from all of this evidence that when the plaintiff went to her father with these allegations she had one of two things in mind -- either she wanted Mr. Palma fired, or she wanted her father to intervene with Mr. Palma so that Mr. Palma would knuckle under to her demands and run the office as she wanted it run. There could be no other motivation. It wasn't to tell the public about all this because she didn't go to the public; she didn't go public at all. One wonders what she would have done if her father, at that time, had not been one of the Commissioners. Therefore, it is my conclusion as a matter of law, based on this undisputed evidence that the plaintiff's communications to her **[377]** father, which ultimately reached the Commissioners, were not constitutionally protected free speech; and that the interest of this governmental entity, The Lincoln Housing Authority, as an employer in promoting the efficiency of the services performed by its employees ranks paramount to any claim of free speech depravation [*sic*] in this case. I conclude, therefore,

that the Civil Rights Act, Section 1983 was never meant to give a remedy of any kind for the plaintiff's conduct which was clearly disruptive of the proper functioning between a superior and subordinate. If this kind of conduct had happened in the private sector, the plaintiff would have been fired within a very short space of time, and no one in the private sector would have raised an eyebrow. I am satisfied, therefore, that the plaintiff has not proven a cause of action against Mr. Palma, and therefore the Clerk will enter judgment for defendant Palma on Count 1 of this complaint.

So, in substance, my determination is that the motion of all defendants for directed verdicts should be granted in this case for the reasons I have outlined, and the Clerk will enter judgment for all defendants in this case. The objections of the plaintiff to the Court's ruling this morning is noted for the records for preservation of rights. Sheriff, bring the jury down so **[378]** I may discharge them.

(Jury present in the courtroom now)

THE COURT: Good morning, ladies and gentlemen. I brought you down to tell you that this case is all over. I have decided as a matter of law that the plaintiff has no right to recover in this case, therefore I have directed the Clerk to enter judgment for all the defendants in this case. I won't bore you by going into the details of it. Suffice it to say that I'm sure the plaintiff disagrees with my decision, and she has a right to appeal to the Rhode Island Supreme Court to have the Court review my decision. If the Court decides that I was wrong they will send it back for a new trial. If they decide I was right that will be the end of the case. So, we have reached this point. I want to thank you very much for sitting on this case, even though you didn't get to decide anything, because your presence here was necessary to bring it to a head. It was necessary to bring this case to trial; to hear the evidence, at least

the plaintiff's side of it, in order get this matter resolved. This is the last case I will try as a Superior Court Judge. I was sworn into office in this courtroom June 24, 1968 by Governor Chafee. I have been here ever since. I have been actually in this courtroom for about sixteen years. I spent the first **[379]** two years partly in Kent County and partly in another room in this courthouse trying cases. I must now prepare to move on to the Federal Court. I will be taking the oath of office across the street in the Federal Courthouse September 5th and so I shouldn't take any more cases because of the time problem involved. But, I will attend to the remainder of my duties and wrap up my affairs. It's ironic that the last case I should try on the Superior Court is essentially a Federal case. I will see many of these cases over in the Federal Court. I have only seen three or four of them during my tenure here on the Superior Court bench, mainly because these types of cases, these claims that people have been deprived of their constitutional rights by some conduct of some official, are usually brought in Federal Court. Sometimes they come here. We have concurrent jurisdiction over these cases. I had a couple involving police officers. Most of them are against police officers. Their job is difficult enough as it is. Every time they turn around somebody is suing them under the Civil Rights Act for various allegations. Some of them are true, some of them aren't. I want to thank you for your service as jurors. I have told every jury who that [*sic*] has ever sat in my courtroom (and that probably equals about seventeen hundred different juries **[380]** over 18 years) that we appreciate them. The jury system in this country wouldn't work unless people such as yourselves were willing to come here and at some sacrifice, at some inconvenience, to be part of our justice system. The jury system works damn well. In some criminal cases the jury has found people not guilty that I thought were guilty, but that is the system, I accept it. Because our theory is that it is better that

that nine people who are guilty be found not guilty than one not guilty person be found guilty. And there's a tremendous burden that the State has to carry, proof beyond a reasonable doubt. So that is part of the system. I have never granted a Motion For New Trial in a criminal case when the jury found somebody guilty. In every one of those cases I was satisfied that that was the right verdict. And, in civil cases I have the power, as any Judge in the Court does, to grant a new trial if I conclude that the jury went off the deep end. Occassionally [*sic*] juries will do that, but not many. I think I can count -- well, maybe a little more than the fingers of both hands -- maybe a dozen cases where I have granted a new trial in civil cases over the years. That is a very small percentage of the cases over which I have presided. In many of those cases it was because the jury was off on the money. They didn't give enough **[381]** money and I had to increase it. I think in only one case, I had to decrease it, and in a few cases I just concluded that the jury came to the wrong result and we had to have a new trial. But overall jurors have done an excellent job in civil cases. We had twelve member juries for most of my tenure here on the bench. In civil cases now we use six member juries. I haven't perceived any great difference in the quality of the results. I suppose it's more likely in a six member jury that one person will dominate the jury, but I haven't seen any great evidence of that. The same thing could happen I suppose in a twelve member jury. So, overall the six member jury system has worked very well. It has been an enjoyable eighteen years. I can tell you honestly that every Monday morning I have looked forward to coming down here to the courthouse to work. I will look forward to the same thing for the next twenty years on the Federal Court. Thank you all very much, and now you are discharged from this case. We will take a recess.

(Court recessed)

Appendix B

July 6, 1988

Supreme Court

Amy Adler

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No. 87-76-Appeal.

The Lincoln Housing
Authority et al.

NOTICE: This opinion is subject to formal revision before publication in the Rhode Island Reports. Readers are requested to notify the Supervisor of Opinion Processing, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, at Tel. 277-6588 of any typographical or other formal errors in order that corrections may be made before the opinion is published.

July 6, 1988

Supreme Court
No. 87-76-Appeal.

Amy Adler

v.

The Lincoln Housing
Authority et al.

OPINION

MURRAY, J. This is an appeal from a judgment of the Superior Court granting the defendants' motion for a directed verdict. We affirm in part and reverse in part.

The plaintiff, Amy Adler, was an employee of the defendant town of Lincoln Housing Authority and was supervised by the executive director, the defendant John Palma (Palma). The plaintiff's employment was terminated on February 5, 1982. She alleges that her discharge was due to her exercise of free speech under the First Amendment to the United States Constitution, in violation of 42 U.S.C.A. § 1983 (West 1981).[1] The trial justice held that plaintiff failed to meet the burden of making an initial showing that her speech was constitutionally protected. He granted defendants' motion for a directed verdict and dismissed the complaint.

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[1] 42 U.S.C.A. § 1983 (West 1981) provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The facts are largely undisputed. The plaintiff learned of an employment possibility at the Lincoln Housing Authority in December 1980 from her father, Robert Custis, who at that time was chairman of the board of commissioners of the housing authority. The plaintiff was interviewed by defendant Palma and was later offered a position that was titled "secretary/bookkeeper and leased housing manager." Her responsibilities included administration of the federally funded section-8 housing program. The plaintiff worked with Palma and the assistant executive director, Carol Kennedy (Kennedy).

Working relations in the office were pleasant until June 1981, when plaintiff noticed strained relations between Palma and Kennedy. Kennedy informed the board of commissioners about the developing hostilities between her and Palma. The board convened to discuss the matter, and on the following day, plaintiff, Palma, and Kennedy met with the chairman and vice-chairman at the housing authority office. The plaintiff and Kennedy were directed to report any future intra-office problems to Palma first, who in turn would contact the commissioners upon request.

Subsequent to the meeting, relations between Palma and Kennedy grew steadily worse and Palma began to direct his anger toward plaintiff. Both Palma and Kennedy testified that Kennedy's refusal to intervene and help resolve a personal matter between Palma and his girlfriend was the cause of their deteriorating relationship.

Beginning in October 1981 plaintiff maintained written records regarding Palma's behavior. She noted that Palma's conduct included excessive absenteeism and use of the office as a personal residence. In addition, plaintiff stated that Palma used public vehicles for personal matters, purchased fuel with housing authority credit cards, and charged long-distance telephone calls to the office. The plaintiff believed that Palma was improperly ignoring regulations concerning the priority of

applicants for section-8 housing and that because of his actions the tenants were being deprived of benefits intended for recipients of federal assistance.

The plaintiff apprised her father of Palma's activities. A meeting of the entire board of commissioners of the housing authority was convened on January 7, 1982. Subsequently, personnel relations worsened, and on February 2, 1982, defendant Palma, through Kennedy, informed plaintiff that she was no longer responsible for administering section-8 housing. In response plaintiff approached Palma and inquired about his decision to change her duties. Palma replied that he owed her no explanation. The plaintiff asked to file a grievance, and Palma replied that the request was denied. The plaintiff questioned Palma's authority to deny her the right to file a grievance, and he replied that if she questioned his authority, she was fired.

The plaintiff contacted one of the commissioners who instructed her to compose a written grievance for review by the board of commissioners. The plaintiff provided a copy of the grievance to Palma in accordance with the directive that she had received from the chairman and vice-chairman of the board. On Friday, February 5, 1982, plaintiff received a letter from Palma stating that she was terminated for "noncompliance and acceptance of work directives and work orders of the Executive Director . . .. Additionally, your direct appeal to the individual Commissioners for reversal of the Executive Director's orders was in violation of personnel policy, and thereof renders you grossly insubordinate to your superior."

At plaintiff's request, the board of commissioners held a hearing on March 18, 1982, regarding her termination. The board sustained Palma's decision to terminate plaintiff. The plaintiff instituted proceedings in Superior Court, alleging that defendants terminated her for speaking out about defendant Palma's malfeasance in office. The plaintiff also sought dam-

ages against defendant Palma, individually, for the intentional infliction of emotional distress.[2]

At the close of plaintiff's testimony the trial justice granted defendants' motion for a directed verdict. The plaintiff alleges that the trial justice (1) erroneously directed a verdict for defendants, (2) erred in dismissing the § 1983 civil rights claim against defendant Palma, (3) erred in dismissing the § 1983 civil rights claim against the Lincoln Housing Authority, and (4) erred in dismissing the conspiracy claim.

I

In considering a motion for a directed verdict, the trial court should review the evidence in the light most favorable to the nonmoving party, without weighing the evidence or the credibility of the witnesses, and extract from the record only the reasonable inferences that support the nonmoving party's position. "If, after such review, the court finds no issues upon which reasonable persons might draw conflicting conclusions, the court should grant the motion. On appeal, we use the same criteria in reviewing the motion." *Sousa v. Chaset,* 519 A.2d 1132, 1135 (R.I. 1987); *Powers v. Carvalho,* 117 R.I. 519, 524-25, 368 A.2d 1242, 1246 (1977).

In the instant case the trial justice granted defendants' motion for directed verdict. He observed that plaintiff was among ten applicants for the position at the housing authority but stated, "It just so happens that Amy Adler was the daughter of Robert Custis who was the chairman of the Board of Commissioners. . . . So we can say with a certain degree of certitude that at

[2]The trial justice granted defendant's motion for a directed verdict for the claim for damages for the intentional infliction of emotional distress. The plaintiff does not appeal from the dismissal of said count.

that time nepotism was alive and well in the Lincoln Housing Authority." In addition he stated that "Amy Adler became dissatisfied with the way Mr. Palma was performing his functions. She doesn't like the silent treatment. She doesn't like his inconsistent moods, and so she chose to violate the directive of the Commissioners. She went to her father who happened to be the chairman of the commissioners." In addition to references that plaintiff was related to the chairman, the trial justice speculated about plaintiff's motivation.

In his decision the trial justice stated, "It is also interesting that before that time Mr. Custis had been in a dispute with Mr. Palma. Mr. Palma had made public allegations about Mr. Custis using maintenance personnel of the Authority at his home and summer residence. Now we begin to see what some of the motivation here may have been. So, Amy Adler became the spy who came in out of the cold." Further, the trial justice inferred from the evidence that "when the plaintiff went to her father with these allegations she had one of two things in mind, either she wanted Mr. Palma fired, or she wanted her father to intervene with Mr. Palma so that Mr. Palma would knuckle under to her demands and run the office as she wanted it run."

The trial justice concluded that plaintiff was grossly insubordinate and disloyal to her superiors and that if she had been employed in the private sector her termination would have been certain. The trial justice remarked that "the fact of the matter is Mr. Palma was the boss and in public employment, at times, public employees must work for petty dictators."

It is our considered judgment that the trial justice did not review the evidence in the light most favorable to plaintiff. Thus, the trial justice erred in granting the motion for directed verdict. The repeated references to the fact that plaintiff's father was the chairman of the board of commissioners indicates that the trial justice attached negative inferences in making his determination. The fact that plaintiff's father was chair-

man is irrelevant. The plaintiff asked to file a grievance, and Palma responded by denying the request and threatening to fire her if she questioned his authority. Because the board of commissioners is vested with the ultimate control over the housing authority, clearly plaintiff's only available recourse was to alert those authorities about Palma's alleged felonious activities. Undoubtedly, plaintiff would have contacted the board whether her father was a member or not.

According to the record, plaintiff testified that she informed the commissioners about Palma's malfeasance because, in her opinion, his actions worked to the detriment of the tenants of the housing authority. The plaintiff's responsibilities for bookkeeping provided access to documents that indicated that Palma was converting federal funds for personal use. However, the trial justice stated that:

> "He was perfectly straightforward and honest with the Commissioners. He told them he had been staying at the authority offices for a period of time and vowed that this would not continue. He admitted to use of the gas credit card and agreed to make restitution for what little gas he had charged on personal business. He admitted that he had used the truck to carry some furniture back up this way from Wickford."

The plaintiff testified that she reported Palma's activities because she believed that the housing authority and its tenants had been deprived of benefits and that his malfeasance constituted a matter of public concern. Palma admitted to the accuracy of many of the allegations. We conclude that the trial justice drew improper inferences and failed to extract the reasonable inferences that clearly supported plaintiff's posi-

tion. In view of the testimony presented, at minimum, reasonable persons might form conflicting conclusions.

II

We turn to plaintiff's contention that the trial justice erred in finding her speech not to be constitutionally protected.

It is clearly established that the government "may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson,* U.S. , 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315, 324 (1987).

> "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968); *Connick v. Myers,* 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983)." U.S. at , 107 S.Ct. at 2896, 97 L.Ed.2d at 324.

The Supreme Court has set forth a three-step analysis in examining a public employee's claim of unconstitutional retaliation. First he or she must demonstrate that the speech was protected by the First Amendment. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Next, the plaintiff must show

that the complained of conduct was a substantial or motivating factor in the defendant's decision to dismiss him or her. Thereafter, the employer has the burden of proving by a preponderance of the evidence that it would have reached the decision to terminate even in the absence of the plaintiff's exercise of allegedly protected speech. *Id.*

The trial justice concluded that, as a matter of law, plaintiff failed to meet the initial burden required in the three-step process. The question whether an employee's speech, for which he or she was allegedly fired, addresses a matter of public concern must be determined by an examination of the content, form, and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708, 720 (1983). If the discharged employee's speech cannot be characterized as a matter of public concern, the reasons for the employee's discharge need not be scrutinized. *Id.* at 146, 103 S.Ct. at 1690, 75 L.Ed.2d at 719. If, on the other hand, the employee's speech meets the threshold requirement, a court must then balance the employee's interest in free expression against the government's interest in curtailing the expression for "the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150, 103 S.Ct. at 1692, 75 L.Ed.2d at 722.

With regard to the inquiry whether the speech was protected by the First Amendment, we note that it is the role of the trial justice to determine the entire question as a matter of law. In *Connick* the Court said in a footnote that "[t]he inquiry into the protected status of speech is one of law, not fact." 461 U.S. at 148 n. 7, 103 S.Ct. at 1690 n. 7, 75 L.Ed.2d at 720 n.7; *see also Rankin,* U.S. at , 107 S.Ct. at 2897 n. 9, 97 L.Ed.2d at 325 n.9. Thereafter, the jury's role is to decide the remaining two elements of a claim: whether the plaintiff had proven that his or her speech was a substantial or motivating factor in the defendant's actions and whether the defendant

had proven that it would have terminated the employee absent the exercise of allegedly protected speech. *Greenberg v. Kmetko,* 840 F.2d 467 (7th Cir. 1988).

In the case before us the trial justice found that plaintiff's speech was not a matter of public concern. We have examined the testimony and evidence set forth by plaintiff concerning defendant Palma's malfeasance. We focus particularly on Palma's admissions to plaintiff's allegations concerning the misuse of public funds and equipment. We are of the opinion that plaintiff's comments address a matter of public concern. Palma was empowered to allocate federal funds to eligible and qualified recipients. He breached his duty of trust to the taxpaying citizens who rely upon the integrity of civil servants selected to administer our system of government. We do not view the fact that Palma was candid about being dishonest and derelict in performing his duties as executive director as negating the validity of plaintiff's exercise of protected speech. Thus, we hold that plaintiff's speech was a matter of public concern and is entitled to First Amendment protection.

The trial justice, in reaching his conclusion, discussed various factors that he believed to weigh against plaintiff's position. He concluded that the speech would impede harmony among coworkers. It is apparent from the testimony of the employees that harmony among coworkers had dissipated prior to plaintiff's comments. In addition the trial justice decided that plaintiff's allegations were not true. However, Palma plainly admits to some of plaintiff's contentions with regard to his misconduct.

The trial justice erred in weighing the fact that plaintiff had private and surreptitious meetings with the commissioners rather than public meetings. The United States Supreme Court views with approval the fact that a "public employee . . . arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan v. Western*

Line Consolidated School District, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619, 625 (1979). Such employee does not lose the right to free speech provided in the first Amendment by virtue of electing to exercise such speech privately rather than publicly. We note with approval the holding in *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983), where the Third Circuit observed that " '[w]e do not underestimate the internal unease or unpleasantness that may follow when a government employee decides to break rank and complain either publicly or to supervisors about a situation which [he or she] believes merits review and reform. That is the price the First Amendment exacts in return for an informed citizenry.' " *Id.* at 105. Indeed, here plaintiff demonstrated restraint by informing Palma's superiors about his conduct rather than make a public announcement.

Accordingly the trial justice erred in dismissing the § 1983 civil rights claim against defendant Palma.

III

The plaintiff contends that the trial justice erred in dismissing the § 1983 claim against the Lincoln Housing Authority. We agree. The trial justice stated that "the Commissioners, in upholding the dismissal of the plaintiff, were not establishing a policy for the future to effect that employees of this Authority will be terminated and fired if they exercise their right of free speech." The plaintiff argues that the trial justice erred because he only considered the fact that the board's ratification of plaintiff's termination was not indicative of future policy. We recognize that a single decision by a municipality can create liability for a § 1983 civil rights claim. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). In *Pembaur* the Court held that a single decision by a

municipality constitutes an act of official policy possibly rendering it liable under an otherwise valid § 1983 claim. The Court stated that: "municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at 483-84, 106 S.Ct. at 1300, 89 L.Ed.2d at 465. *See also City of St. Louis v. Praprotnik,* U.S. , 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). In *City of St. Louis* the court stated that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." U.S. at , 108 S.Ct. at 926, 99 L.Ed.2d at 120.

In the case before us a review of the table of organization in the personnel-policy manual indicates that the board of commissioners retains control and final authority over the executive director. The board ratified the decision by Palma to terminate plaintiff.

Thus we hold that *Pembaur* is applicable to the instant case and the trial justice erred in dismissing the § 1983 civil rights claim against the Lincoln Housing Authority. The housing authority, as a properly constituted administrative body, is liable for acts that it has officially sanctioned or ordered. *Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298-99, 89 L.Ed.2d at 463.

IV

The plaintiff argues that the trial justice erred in dismissing the conspiracy claim against the board of commissioners. He held that there was "a complete [dearth] of evidence" to prove the conspiracy claim. Our review of the record indicates that

there is insufficient evidence to support the claim. Thus, we uphold the dismissal by the trial justice of the conspiracy claim.

Accordingly the decision of the Superior Court is reversed in part and affirmed in part. The case is remanded for further proceedings consistent with this opinion.

Supreme Court, U.S.
FILED
NOV 4 1988
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CLERK

No. 88-585

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN PALMA and LINCOLN HOUSING AUTHORITY,
PETITIONERS,

v.

AMY ADLER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I

QUESTIONS PRESENTED

1. Should the petition for certiorari be dismissed for want of jurisdiction because the decision of the Rhode Island Supreme Court, which reversed a directed verdict for petitioners (defendants below) and remanded the case for a new trial, is not a final judgment or decree as required by 28 U.S.C. § 1257?

2. Did the Rhode Island Supreme Court correctly rule that the trial judge had violated the standard for assessing the evidence on a motion for a directed verdict, had erroneously viewed the evidence in the light least favorable to the respondent (plaintiff below), had improperly drawn inferences against respondent, and, consequently, that he had erred in granting petitioners' motion for a directed verdict on respondent's civil rights claims?

3. Did the Rhode Island Supreme Court correctly hold that when respondent, an employee of petitioner Lincoln Housing Authority, reported to the chairman of the authority's board of commissioners her observations of malfeasance by the authority's executive director, petitioner Palma, including his appropriation of public funds and equipment for his personal use, her statements constituted speech on a matter of public concern?

4. Did the Rhode Island Supreme Court correctly hold that the petitioner housing authority could be held liable under 42 U.S.C. § 1983 for ratifying petitioner Palma's termination of respondent's employment, on the ground that such ratification constituted an act of official policy?

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Statement of the Case	2
Reason Why the Petition Should be Denied	6
I. The Decision of the Rhode Island Supreme Court Is Not a Final Judgment or Decree and Therefore Is Not Reviewable in This Court	6
II. The Rhode Island Supreme Court Correctly Ruled That the Trial Judge Violated the Standard for Assessing the Evidence on a Motion for a Directed Verdict	13
III. Respondent's Speech Obviously Addressed a Matter of Public Concern	15
IV. The Lincoln Housing Authority Is Liable Under 42 U.S.C. § 1983 for Ratifying Palma's Decision to Terminate Respondent's Employment	17
Conclusion	20

Table of Citations

Cases:

Bitgood v. *Allstate Insurance Co.*, 481 A.2d 1001 (R.I. 1984) 13

City of St. Louis v. *Praprotnik*, 108 S. Ct. 915 (1988) 18, 19

Connick v. *Myers*, 461 U.S. 146 (1983) 15

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 6, 7, 8, 9, 10, 11, 12

Espinoza v. *O'Dell*, 633 P.2d 455 (Colo. 1981) 12

Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) 16

Page

Goldstein v. *Kelleher*, 728 F.2d 32 (1st Cir. 1984) 13n
Greminger v. *Seaborne*, 584 F.2d 275 (8th Cir. 1978) 17
Hornyak v. *Pomfret School*, 783 F.2d 284 (1st Cir. 1986). 13n
Lemieux v. *Leonard Construction Co.*, 73 R.I. 338, 58 A.2d 625 (1947) 10
McNeese v. *Board of Education*, 373 U.S. 668 (1963) 19
Montuori v. *Narragansett Electric Co.*, 418 A.2d 5 (R.I. 1980) 13
Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1976) 7, 9
O'Dell v. *Espinoza*, *cert. granted*, 454 U.S. 1122 (1981), *dismissed for want of jurisdiction*, 456 U.S. 430 (1982) 12, 13
Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986) 17, 18, 19
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 8
Rankin v. *McPherson*, 107 S. Ct. 2891 (1987) 15, 16
San Diego Gas & Electric Co. v. *City of San Diego*, 450 U.S. 621 (1981) 7
Wisconsin v. *Constantineau*, 400 U.S. 433 (1971) 19
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 19
Zwickler v. *Koota*, 389 U.S. 241 (1967) 19

Constitutional Provisions:

United States Constitution,
First Amendment 12, 14, 16

Statutes:

28 U.S.C. §1257 ..... 1, 2, 6
§1257(3) 1
42 U.S.C. §1983 ..... 1, 2, 3, 6, 12, 17, 18
§1985 ..... 2, 3, 6, 12

Miscellaneous:

Page

Annot., 29 L. Ed. 2d 872 (1972) 6

Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004 (1978) 7, 8, 9, 10, 11

In the
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OCTOBER TERM, 1988

No. 88-585

JOHN PALMA and LINCOLN HOUSING AUTHORITY,
PETITIONERS,

v.

AMY ADLER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Opinions Below

The trial judge's decision was rendered from the bench and is not reported. The opinion of the Rhode Island Supreme Court is reported *sub nom. Adler* v. *Lincoln Housing Authority*, 544 A.2d 576 (R.I. 1988).

Jurisdiction

Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(3). However, the Rhode Island Supreme Court did not

render a "final judgment or decree," which is necessary to vest jurisdiction in this Court under § 1257; rather, it reversed the judgment that had been entered on a directed verdict for petitioners and remanded the case to the superior court for a new trial. Respondent therefore submits that the petition for certiorari should be dismissed for want of jurisdiction.

Statute Involved

Respondent concurs with petitioners' statement under this heading.

Statement of the Case

The respondent, Amy Adler, brought this action in state court under 42 U.S.C. §§ 1983 and 1985, as well as under Rhode Island common law. The complaint alleged that petitioners — the Lincoln Housing Authority and its executive director, John Palma — had terminated respondent's employment with the housing authority in violation of her constitutional right to freedom of speech on matters of public concern. The case was tried to a jury. At the conclusion of respondent's case, the trial judge granted petitioners' motion for a directed verdict on all counts.

On appeal, the Rhode Island Supreme Court reversed the judgment and remanded the case for a new trial on the § 1983 claims. The court held that the trial judge had erroneously viewed the evidence in the light most favorable to petitioners and had improperly drawn inferences in their favor; that respondent's speech addressed a matter of public concern and therefore was constitutionally protected; and that the authority's ratification of Palma's decision to terminate respondent was an act of official policy for which the authority could be held liable under § 1983. Respondent did not appeal the trial judge's dismissal of her state law claim for intentional inflic-

tion of emotional distress (544 A.2d at 579 n.2, App. at 23a n.2); nor does she challenge in this Court the Rhode Island Supreme Court's rejection of her conspiracy claim under 42 U.S.C. § 1985 (544 A.2d at 582, App. at 30a-31a). Thus, the only issue before this Court (apart from its jurisdiction, which respondent contends is lacking in this case) is whether the Rhode Island Supreme Court correctly reversed the directed verdict on respondent's § 1983 claims.

Petitioners' statement of the case is highly misleading, both procedurally and factually, because it ignores the posture in which this case reached the Rhode Island Supreme Court and, consequently, the posture in which it reaches this Court. Nowhere do petitioners acknowledge that the court below remanded this case to the nisi prius court for a new trial. The words "directed verdict" do not appear in the petition; nor do petitioners bother to mention either the duty of a trial judge when ruling on a motion for a directed verdict or the standard of review on appeal of a directed verdict. To the contrary, the petition leaves the distinct impression that the trial judge was the finder of fact (Pet. at 9, 11) and that the Rhode Island Supreme Court, "reading from a 'cold record' and not having the opportunity to see the witnesses" (Pet. at 11), improperly rejected his factual findings. Nothing could be farther from the truth; a jury was the trier of fact in this case, and it was the trial judge, not the supreme court, who improperly invaded the province of the factfinder. Thus, petitioners' statement of "facts," which for the most part either paraphrases or repeats verbatim the trial judge's "findings," is fatally flawed.

The evidence, viewed in the light most favorable to respondent and with all reasonable inferences drawn in her favor, establishes the facts set forth in the opinion of the Rhode Island Supreme Court (544 A.2d at 578-80, App. at 21a-26a). Briefly, those facts are as follows.

The Lincoln Housing Authority is a governmental agency created by the Rhode Island Legislature to take advantage of

federally funded housing programs. In January 1981 petitioner Palma, the authority's executive director, hired respondent for a position entitled "secretary/bookkeeper and leased housing manager." Her duties included administration of the federal section 8 housing program. She worked in an office with Palma and the assistant executive director, Carol Kennedy.

Working relations in the office grew strained when Kennedy refused Palma's request that she help resolve a personal problem between Palma and his girlfriend, who was a former employee of the authority and friend of Kennedy's. Kennedy reported this to the chairman of the authority's board of commissioners, and in June 1981 the board met to discuss the matter. The next day, Palma, Kennedy and respondent met with the chairman and vice-chairman of the board. "[Respondent] and Kennedy were directed to report any future intra-office problems to Palma first, who in turn would contact the commissioners upon request." (544 A.2d at 578, App. at 21a.)

Thereafter, relations between Palma and Kennedy grew steadily worse, and Palma began to direct his anger toward respondent as well. Beginning in October 1981, respondent maintained written records regarding Palma's behavior. Her motive was to document that she and Kennedy were often forced to take official action on Palma's behalf because of his excessive absence from the office. Respondent also observed that Palma was using the authority's office as his personal residence[1] and that he was using the authority's trucks and gasoline credit cards for his personal needs. Respondent also "believed that Palma was improperly ignoring regulations concerning the priority of applicants for section-8 housing and that because of his actions the tenants were being deprived of benefits intended for recipients of federal assistance." (544 A.2d at 578, App. at 21a-22a.)

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[1] Petitioners claim that the office "had apartment facilities" (Pet. at 4). There is no evidence in the record to support this assertion; to the contrary, respondent and Kennedy both testified that they would arrive at work in the morning to find Palma asleep *in their office* on a rollaway bed.

Respondent apprised the chairman of the board of commissioners of Palma's activities.[2] As a result, the entire board met with Palma on January 7, 1982 to discuss respondent's complaints. Palma admitted using the authority's office as his personal residence for over 3 months, using an authority truck to move his own furniture, and using an authority credit card to buy fuel for the truck while on personal business.[3] He made restitution to the authority for his use of the credit card and offered to reimburse the authority for making the office his home.

> Subsequently, personnel relations worsened, and on February 2, 1982, defendant Palma, through Kennedy, informed plaintiff that she was no longer responsible for administering section-8 housing. In response plaintiff approached Palma and inquired about his decision to change her duties. Palma replied that he owed her no explanation. The plaintiff asked to file a grievance, and Palma replied that the request was denied. The plaintiff questioned Palma's authority to deny her the right to file a grievance, and he replied that if she questioned his authority, she was fired. [544 A.2d at 578, App. at 22a.]

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[2] The chairman at that time was respondent's father. The trial judge's repeated, sarcastic references to this fact

> indicate[] that [he] attached negative inferences in making his determination. The fact that plaintiff's father was chairman is irrelevant. . . . Because the board is vested with the ultimate control over the housing authority, clearly plaintiff's only available recourse was to alert those authorities about Palma's alleged felonious activities. Undoubtedly, plaintiff would have contacted the board whether her father was a member or not.

544 A.2d at 579-80, App. at 24a-25a. Moreover, petitioners' statement that Palma and respondent's father had been engaged in a public dispute "just before this time" (Pet. at 5) is incorrect; in fact, that dispute took place approximately 4 years before the events narrated herein. Again, the trial judge improperly drew a negative inference from the long-ago dispute between Palma and respondent's father (App. at 8a).

[3] Palma admitted all this at trial. It is not clear from the record what, if anything, he admitted to the commissioners at the meeting of January 7, 1982.

Respondent contacted one of the commissioners, who instructed her to submit a written grievance to the board. She did so, providing a copy to Palma. Three days later, Palma handed her a letter stating that her employment was terminated. Subsequently, after a hearing held at respondent's request, the board of commissioners sustained Palma's decision.

As previously noted, the trial judge entered judgment on a directed verdict in favor of petitioners. The Rhode Island Supreme Court affirmed in part (on the § 1985 claim) and reversed in part (on the § 1983 claims) and ordered the case "remanded for further proceedings consistent with this opinion" — *i.e.*, a new trial on the § 1983 claims. (544 A.2d at 582, App. at 31a.)

Reasons Why the Petition Should Be Denied

I. The Decision of the Rhode Island Supreme Court Is Not a Final Judgment or Decree and Therefore Is Not Reviewable in This Court.

This Court's jurisdiction to review state court decisions by way of either appeal or certiorari is governed by 28 U.S.C. § 1257, which limits that jurisdiction to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." When, as here, a state appellate court remands a case to a nisi prius court for trial on the merits, its decision is not final and therefore is not ordinarily reviewable under § 1257. Annot., 29 L. Ed. 2d 872, 883-87 (1972) (citing many cases).

Nevertheless, the finality requirement of § 1257 has not been applied in a mechanical or strictly literal fashion; rather, the Court has taken a pragmatic approach, recognizing that there are circumstances justifying a departure from the rule of finality. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469

(1975), the Court "elaborated a conceptual scheme of four discrete categories to encompass its prior decisions permitting an exception to the rule of finality and presumably to serve as a guide for future applications of section 1257." Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1005 (1978) (hereinafter "Finality Note").[4] This case does not fall into any of the *Cox* exceptions to the rule of finality, and the petition should therefore be dismissed for want of jurisdiction.

The first of the *Cox* exceptions applies "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 479. In this situation "the federal claim to be reviewed on interlocutory appeal is, as a practical matter, conclusive of the case because the party asserting the claim has no other grounds upon which to rest his claim." Finality Note, 91 Harv. L. Rev. at 1015 (footnote omitted). In the instant case, the Rhode Island Supreme Court has held that respondent's speech addressed a matter of public concern and therefore was constitutionally protected. However, respondent still must persuade a jury that her constitutionally protected conduct was a substantial or motivating factor in her termination. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1976). Furthermore, the jury will be permitted to find in petitioners' favor if

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[4] The notewriter concludes that three of the four categories identified in *Cox*

> create difficulties both because their imprecision leads to a disturbing unpredictability in application and, more importantly, because their content rests upon premises that diverge from the assumption that underlies the "entire case" paradigm — that as a general rule, the benefits of interlocutory appeals in the individual case are to be sacrificed for the systemic benefit gained by predicating appellate jurisdiction upon finality.

Finality Note, 91 Harv. L. Rev. at 1026. *See also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 501-12 (Rehnquist, J., dissenting); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 633-36 (1981) (Rehnquist, J., concurring).

petitioners can show by a preponderance of the evidence that they would have fired respondent even in the absence of her protected conduct. *Id.* Thus, the decision below is not dispositive of this litigation, the case is not "for all practical purposes concluded," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 479, and it therefore does not fall into the first *Cox* category.

The second category consists of cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480.[5] An example cited by the Court in *Cox* is *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945):

> In *Radio Station WOW*, the Nebraska Supreme Court directed the transfer of the properties of a federally licensed radio station and ordered an accounting, rejecting the claim that the transfer order would interfere with the federal license. The federal issue was held reviewable here despite the pending accounting on the "presumption . . . that the federal questions that could come here have been adjudicated by the State court, and that *the accounting which remains to be taken could not remotely give rise to a federal question . . . that may later come here . . . .*"

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. at 480, *quoting Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 127 (emphasis added). Thus, "[b]y definition, if the Court accepts such a case for interlocutory review, it will not have to reconsider the case at a later date *because the predicate to the exception is that no federal issues remain to be raised.*" Finality Note, 91 Harv. L. Rev. at 1019 (emphasis added; footnote omitted).

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[5] The Harvard notewriter suggests that a better explanation of the Court's willingness to review cases in this category is that the petitioner would have suffered irreparable injury before final judgment. Finality Note, 91 Harv. L. Rev. at 1017-18.

This exception does not apply here, because federal issues remain to be raised in this case. As noted above, at retrial respondent must meet the burdens of production and persuasion imposed by the *Mt. Healthy* case, 429 U.S. at 287, and petitioners are free to attempt the affirmative defense established in that case, *id.* These are federal issues, and their resolution by the trial judge, the jury, and ultimately the Rhode Island Supreme Court on appeal, will be reviewable in this Court after final judgment. In fact, there are no state law issues left in this case, because respondent did not appeal the trial judge's dismissal of her state law claim for intentional infliction of emotional distress. This is now a pure § 1983 action, indistinguishable from a similar case tried in a federal district court. In such a case, "the likelihood that other federal questions will be raised in the course of the proceedings creates a substantial possibility of delay from multiple appeals." Finality Note, 91 Harv. L. Rev. at 1019 n.85. Consequently, this case does not fit into *Cox* category 2.

Furthermore, the other requisite of category 2 also is not met here, because the Rhode Island Supreme Court has not "finally" decided whether respondent's speech is constitutionally protected:

> It is to be borne in mind that such conclusions of law as we stated in the original opinion were conditioned, so to speak, by *the status of the case at that time when only the plaintiff's evidence was before us.* When the case is fully tried defendants conceivably may be able to present evidence which will remove several *inferences favorable to the plaintiff which we were required to draw on the record before us.*
>
> *In the event of such an altered factual situation* defendants would not be foreclosed by such conclusions of law as we laid down in the original opinion based upon different facts.

Lemieux v. *Leonard Construction Co.*, 73 R.I. 338, 350, 58 A.2d 625, 625-26 (1947) (emphasis added). Respondent hastens to add that she does not believe that at retrial petitioners will be able to establish "an altered factual situation" which would justify a change in the Rhode Island Supreme Court's holding that her speech addressed a matter of public concern. The fact remains, however, that the Rhode Island Supreme Court cannot *finally* determine that issue until it is presented with a complete record — *i.e.*, a record that includes petitioners' evidence as well as repondent's.

Category 3 comprises cases in which

> the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. at 481.[6] There are three reasons why the case at bar does not fall into this category. First, as demonstrated above, the federal claim has not been "finally" decided. Second, if petitioners ultimately prevail on the merits, the federal issue will not be mooted; all of the issues in this case are federal issues, and all of them would be reviewable on respondent's appeal to the Rhode Island Supreme Court, should the verdict go against her at retrial. Third, if petitioners lose the second trial, they will be able to appeal to the Rhode Island Supreme Court and obtain review of their defenses on the whole record.

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[6] The Harvard notewriter criticizes this category as being fundamentally inconsistent with the independent and adequate state grounds doctrine. Finality Note, 91 Harv. L. Rev. at 1021-23.

The fourth and last of the *Cox* exceptions involves

> those situations where the federal issue has been finally decided in the state courts *with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issues by this Court*, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . . In these circumstances, *if a refusal immediately to review the state court decision might seriously erode federal policy*, the Court has entertained and decided the federal issue, which itself has been *finally* determined by the state courts for purposes of the state litigation.

Id. at 482-83 (empahsis added).[7] Here, as previously noted, the federal issues have not been finally determined by the state courts. Moreover, there are no nonfederal grounds upon which petitioners may ultimately prevail on the merits, because there are no nonfederal issues left in this case. Finally, a refusal of piecemeal review will not erode federal policy; to

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[7] This category has been criticized as being "formless," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 507 (Rehnquist, J., dissenting), and "susceptible of virtually limitless expansion," Finality Note, 91 Harv. L. Rev. at 1025 (footnote omitted). Moreover,

> the imprecise manner in which the scope of the category is defined invites litigants to seek review in all cases in which even arguably significant federal rights are asserted. . . . Even if the Court denies review of many of these interlocutory orders, the unpredictability of the exception disrupts the state court proceedings in general and forces the Court itself to evaluate an increased number of petitions for interlocutory review, thereby nullifying the efficiency of the finality principle.

Id., at 1025-26. The instant petition demonstrates that this is not an unfounded concern. This case, which was placed on the superior court's trial calendar at the beginning of September so that the retrial could be scheduled, has been continued indefinitely at petitioners' request until this Court rules on the petition. This delay works substantial hardship on respondent.

the contrary, the Rhode Island Supreme Court has upheld federal policy, as set forth in the First Amendment, 42 U.S.C. § 1983, and the relevant decisions of this Court.

Respondent submits that the disposition of this case is controlled by *O'Dell* v. *Espinoza*, *cert. granted*, 454 U.S. 1122 (1981), *dismissed for want of jurisdiction*, 456 U.S. 430 (1982) (per curiam). In *O'Dell*, the plaintiffs (respondents in this Court) had brought suit in Colorado state court under 42 U.S.C. §§ 1983 and 1985 seeking damages for the death of one Arthur Espinoza, who had been shot and killed by police officers. *Espinoza* v. *O'Dell*, 633 P.2d 455, 459 (Colo. 1981). The complaint asserted no claims under the state wrongful death act. The trial court dismissed the complaint on the ground that "a federal wrongful death remedy does not exist under 42 U.S.C. § 1983 or 1985 independent of state wrongful death remedies." *Id.* The Colorado Supreme Court reversed, holding that the trial court had misconstrued earlier Colorado case law upon which it had relied, that the complaint stated a § 1983 claim upon which relief could be granted, and that the trial court had therefore erred in dismissing that claim. *Id.* at 462. Accordingly, the supreme court remanded the case to the trial court for further proceedings. *Id.* at 469. This Court granted the defendants' petition for certiorari, but subsequently dismissed the case for want of jurisdiction:

> Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

456 U.S. at 430 (citations other than to *Cox* omitted).

In this case, as in *O'Dell*, the state supreme court has simply ruled that the plaintiff/respondent is entitled to have her federal claims, which are the only claims she is asserting, heard and determined by a jury. Such a ruling, as the Court noted in *O'Dell*, does not fit into any of the *Cox* categories. Respondent therefore submits that the petition for certiorari should be dismissed for want of jurisdiction.

II. The Rhode Island Supreme Court Correctly Ruled That the Trial Judge Violated the Standard for Assessing the Evidence on a Motion for a Directed Verdict.

The question whether a state supreme court was correct in holding that a state trial judge improperly withdrew a case from a jury's consideration hardly seems sufficiently important to warrant this Court's attention, even when the case in question involves a federal civil rights claim. Be that as it may, the Rhode Island Supreme Court's ruling on this point was manifestly proper.

The standard applicable to a motion for a directed verdict is well established in Rhode Island. Both the trial court and the appellate court must view the evidence in the light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences that may be drawn in his favor, without weighing the evidence or assessing credibility. If the evidence, so viewed, reveals issues upon which reasonable minds could differ, the case must be submitted to the jury. *E.g.*, *Bitgood* v. *Allstate Insurance Co.*, 481 A.2d 1001, 1005 (R.I. 1984); *Montuori* v. *Narragansett Electric Co.*, 418 A.2d 5, 9 (R.I. 1980).[8]

The trial judge apparently approached this case with preconceived notions about the nature of public employment

[8] The federal standard is essentially the same. *See, e.g.*, *Hornyak* v. *Pomfret School*, 783 F.2d 284 (1st Cir. 1986); *Goldstein* v. *Kelleher*, 728 F.2d 32, 39 (1st Cir. 1984).

which led him to view respondent's conduct in an unfavorable light. He remarked that "Mr. Palma was the boss and in public employment, at times, public employees must work for petty dictators" (App. at 5a). He also stated that "[i]f this kind of conduct [*i.e.*, respondent's reporting Palma's malfeasance to his superiors] had happened in the private sector, the plaintiff would have been fired within a very short space of time, and no one in the private sector would have raised an eyebrow" (App. at 16a). Not only is it irrelevant whether a private employee, who does not have First Amendment rights vis-a-vis her employer, could be fired for the same conduct; in addition, this remark reveals a pro-employer bias that led the trial judge to draw inferences against respondent.

For example, with regard to the truthfulness of respondent's complaints against petitioner Palma, the trial justice stated that "[i]t became readily apparent to the Commissioners that most of these allegations were unfounded" (App. at 9a). There is absolutely nothing in the record to support this conclusion; to the contrary, "Palma admitted to the accuracy of many of the allegations" (544 A.2d at 580, App. at 25a). There is no evidence in the record of any factfinding by the commissioners on the truthfulness of respondent's charges. Viewing the evidence in the light most favorable to respondent, the only permissible inferences are that the charges were true and that the commissioners knew they were true but did not care.

The Rhode Island Supreme Court concluded its discussion of this issue as follows:

> The plaintiff testified that she reported Palma's activities because she believed that the housing authority and its tenants had been deprived of benefits and that his malfeasance constituted a matter of public concern. Palma admitted to the accuracy of many of the allegations. We conclude that the trial justice drew improper inferences and failed to extract the reasonable inferences

> that clearly supported plaintiff's position. In view of the testimony presented, *at minimum*, reasonable persons might form conflicting conclusions.

544 A.2d at 580, App. at 25a-26a (emphasis added). There is nothing in the petition to create even a shadow of a doubt concerning the correctness of this conclusion.

III. Respondent's Speech Obviously Addressed a Matter of Public Concern.

In cases of this type, in which a public employee claims that she was fired because of something she said, "[t]he threshold question . . . is whether [the employee's] speech may be 'fairly characterized as constituting speech on a matter of public concern.' " *Rankin* v. *McPherson*, 107 S. Ct. 2891, 2896-97 (1987), *quoting Connick* v. *Myers*, 461 U.S. 138, 146 (1983). This is a question of law to be determined by the court, *Connick* v. *Myers*, 461 U.S. at 148 n.7, based upon "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

Allegations of abuse of office and theft of public resources by the director of a public agency are inherently matters of public concern. *See id.* at 148 & n.8 (plaintiff's complaints did not address matters of public concern because, *inter alia*, she did not seek to expose "wrongdoing or breach of public trust" on the part of her superior). As the Rhode Island Supreme Court put it:

> We focus particularly on Palma's admissions to plaintiff's allegations concerning the misuse of public funds and equipment. We are of the opinion that plaintiff's comments address a matter of public concern. Palma was empowered to allocate federal funds to eligible and qualified recipients. He breached his duty of trust to the taxpaying

> citizens who rely upon the integrity of civil servants selected to administer our system of government. We do not view the fact that Palma was candid about being dishonest and derelict in performing his duties as executive director as negating the validity of plaintiff's exercise of protected speech. [544 A.2d at 581, App. at 28a.]

Petitioners, like the trial judge, lay great stress on the fact that respondent spoke privately to the chairman of the board of commissioners about her concerns, rather than making a public announcement. (Pet. at 4, 9, 11; App. at 6a-7a, 14a.) Their argument that this deprives respondent's speech of First Amendment protection is patently frivolous. In its most recent opinion on this subject, this Court held that a statement made by a public employee in a private conversation with her boyfriend in a back office, which was overheard by another employee without the speaker's knowledge, was entitled to First Amendment protection. The Court expressly noted that "[t]he private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern." *Rankin* v. *McPherson*, 107 S. Ct. at 2898 n.11, *citing Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414-16 (1979) (*held*, First Amendment protection is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public").

Finally, petitioners say that respondent was fired, not because she reported Palma's malfeasance, but because she was insubordinate (Pet. at i, 9-10). This issue is not actually raised in the present posture of the case; the trial judge held that respondent's speech was not constitutionally protected as a matter of law (App. at 15a), so he had no need to decide, and did not decide, why she was fired (App. at 13a). Contrary to petitioners' suggestion (Pet. at 10), the Rhode Island Supreme Court expressed no opinion on this issue. Nevertheless, in

view of petitioners' harping on this point,[9] it is worth noting that whether respondent's constitutionally protected conduct was a substantial or motivating factor in the decision to terminate her is a question of fact for the jury. *Greminger* v. *Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978). A reasonable person could conclude that respondent was fired because she brought Palma's misconduct to the attention of the board of commissioners, through its chairman. On petitioners' motion for a directed verdict, that inference must be drawn in respondent's favor.

IV. The Lincoln Housing Authority Is Liable Under 42 U.S.C. § 1983 for Ratifying Palma's Decision to Terminate Respondent's Employment.

The Lincoln Housing Authority's board of commissioners held a hearing at respondent's request to review her termination. After the hearing, which respondent and her counsel attended, the board took the matter under advisement. At a subsequent meeting, to which respondent and her counsel were not invited, the board voted to sustain Palma's decision. The Rhode Island Supreme Court correctly held that the authority is liable under § 1983 for this act of official policy.

The Court has addressed this subject twice in recent years. In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986),[10] the Court emphasized that a municipality[11] is liable not only for acts which it "has officially . . . ordered," but also for acts which it "has officially sanctioned." *Id.* at 480. The Court went on to explain that

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[9] "[T]he [Rhode Island] Supreme Court, for some reason, ignored the crucial aspect of the case, which is the centerpiece for the reasons of the firing." (Pet. at 10).

[10] Although part II-B of the *Pembaur* decision was joined only by a plurality of the Justices, respondent relies upon part II-A of the decision, which was joined by a majority and is the opinion of the Court.

[11] The trial judge correctly held that the Lincoln Housing Authority is the equivalent of a municipality for § 1983 purposes. (App. at 3a.)

> a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. *If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of "policy" as that term is commonly understood.* More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

Id. at 481 (emphasis added). Last Term, in *City of St. Louis* v. *Praprotnik*, 108 S. Ct. 915 (1988), Justice O'Connor, writing for a plurality, stated that the actions of municipal officials who have "final policymaking authority" will subject the municipality to § 1983 liability, that whether an official has such authority is a question of state law, and that the official must be "responsible under state law for making policy in *that area* of the city's business." *Id.* at 924. (emphasis in original). The plurality explained the basis for municipal liability in cases like this one as follows:

> [W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. at 926 (emphasis in original).

Here, the Rhode Island Supreme Court has held that "the board of commissioners retains control and *final authority*

over the executive director. The board ratified the decision by Palma to terminate plaintiff." 544 A.2d at 582, App. at 30a (emphasis added). Thus, the board has final policymaking authority for the Lincoln Housing Authority, and it is responsible under Rhode Island law for the authority's personnel policies. *Praprotnik* v. *City of St. Louis*, 108 S.Ct. at 924. The board approved Palma's decision to fire respondent. *Id.* at 926. Such ratification constituted "a course of action tailored to a particular situation and not intended to control decisions in later situations," and the decision to take that course of action was "properly made by [the housing authority's] authorized decisionmakers." *Pembaur* v. *City of Cincinnati*, 475 U.S. at 481. In these circumstances, the Rhode Island Supreme Court was clearly correct in holding that "the housing authority, as a properly constituted administrative body, is liable [under § 1983] for acts that it has officially sanctioned . . . ." (544 A.2d at 582, App. at 30a.)

Petitioners' only argument on this point is the astonishing assertion that respondent's § 1983 action against the authority is barred because her attempt to obtain judicial review of the board's decision, in the hope of overturning it on state law grounds, was dismissed because it was filed in the wrong court. (Pet. at 12-14; see App. at 11a.) Petitioners contend that this case is distinguishable from *Pembaur* and *Praprotnik* because the board's decision was "subject to judicial review in the state court system." (Pet. at 12.) Petitioners cite no authority for this proposition; nor could they, for the law is firmly settled the other way. This Court has repeatedly held in a variety of contexts that the exhaustion of judicial remedies available under state law is not a prerequisite to § 1983 relief. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 379-80 n.5 (1978); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437-39 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 245-52 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963).

Conclusion

For the reasons set forth in point I of this brief, respondent respectfully requests that the petition be dismissed for want of jurisdiction. Alternatively, for the reasons set forth in points II, III and IV, respondent respectfully requests that certiorari de denied.

By her attorneys,

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